

## ODOR REGULATION BY NUISANCE LAWS

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Confined feeding operations are subject to both public and private air pollution regulation. *Public regulation* is focused primarily on preventing measurable levels of emissions to the atmosphere. On the other hand, subjective human tolerance levels serve as the basis for *private regulation* of the environment. The impact of public and private regulatory schemes on feedlots will be reviewed.

### Public Regulation of Odors

Air pollution problems in the livestock feeding industry consist mainly of odors from feeding operations, odors from packing plants and particulates from processing plants. At the federal level, the U.S. Environmental Protection Agency has no regulations or standards applicable to odors.

The EPA Administrator's Office has stated that odors are a local problem amenable to local controls, rather than a national problem requiring national controls. Probably the main reason is that nearly all odorous substances are non-toxic, biodegradeable (organic) or highly reactive inorganic compounds, and do not irreparably damage or pollute anything. Medical opinion is that odors are merely a nuisance unless the ingredients are toxic.

The vast majority of compliance and enforcement work for air pollution is carried out at the state level. Regarding odors in a direct sense, the Texas Air Control Board (TACB) has a construction and operating permit program. New livestock feeding operations with more than 1,000 head (any size or type of animal) have to get a construction permit before construction is actually started. Existing operations that expand by more than 100 percent of the present size must also get this construction permit.

In issuing construction permits, the TACB considers such things as location of the facility with respect to surrounding land use and prevailing winds, waste management system design, community protest and other factors. After the facility has operated for 60 days or more, an operating permit can be applied for. The performance of the facility with respect to odors and other forms of air pollution will have a lot to do with issuance of the operating permit.

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The Texas Air Control Board has adopted a *nuisance regulation* (General Rule 5) that applies specifically to odor emissions. This regulation states:

"No person shall discharge from any source whatsoever one or more air contaminants or combinations thereof, in such concentrations and such duration as are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation or property, or as to interfere with the normal use and enjoyment of animal life, vegetation or property."

The *Texas Criminal Misdemeanor Law* lists nuisance resulting from odors, flies, water pollution, noise or other occurrences as a misdemeanor, punishable by a maximum fine of \$200. This law is enforced through public nuisance lawsuits brought by district and county attorneys in local courts.

Another means of regulating odors is through *state odor intensity standards*. To date, seven states plus the District of Columbia have enacted numerical standards based on the odor threshold in ambient air at the property line. These standards are based on reliable methods of odor measurements, and they range from 2 to 127 dilutions to threshold. Many state and livestock association officials feel that such odor intensity standards should be used only in cases where legitimate public nuisance complaints have been registered. The state of Iowa has proposed a procedure for determining the legitimacy of public nuisance complaints.

### Private Regulation of Odors

The concept of nuisance has not always been a part of our common law. In early days, the landowner could do with his land as he wished. As time passed, it became clear that adjacent landowners might use their property in ways that were not compatible with each other. There began to develop in our common law the basic right that a landowner not be interfered with in the enjoyment and use of his property. The two basic legal principles that (a) one may use his land completely as he wishes, and (b) one may not interfere with another's right to enjoy his own property, came squarely into conflict. Nuisance law attempts to solve this conflict by adding an element of "reasonableness."

The common law regarding nuisance now says,

in effect, that all persons have the basic right to enjoy their property. Any unreasonable interference with enjoyment is legally a nuisance. A nuisance may involve air pollution, water pollution, noise or many other types of disruptive activities. The rules governing conduct in this area are basically the same in all states.

Since a civil lawsuit, based on the nuisance law, necessarily involves a jury decision, the determination of "unreasonable interference with enjoyment of property" may vary. Some jurors might find "unreasonable interference with enjoyment" even though an operation is meeting all public air and water pollution regulations and standards. Consequently, it is possible for a livestock feeder to be sued under the nuisance law even though he complies with his state regulatory agency.

The mere threat of a lawsuit under the nuisance law may affect the feedlot's conduct with regard to waste management practices. This changed conduct is in itself a form of "private regulation" of pollution.

A nuisance suit against a livestock or poultry producer may involve a request for an injunction, for damages, or for both an injunction and damages. If the suit is for an injunction, the court seeks to be fair to both parties. The court weighs (a) the plaintiff's allegations that the operation makes living conditions intolerable, is a hazard to health and/or lowers the value of the land, *versus* (b) the defendant's assertions that sizeable investments and perhaps jobs for the community would be lost if the injunction were granted. The party found to have the greater interest will win the lawsuit.

## TYPES OF NUISANCES

### Public vs. Private Nuisances

There are two types of nuisance: public and private. When a feedlot is run in such a manner as to disturb the rights of a large number of people, this may be called a "public nuisance." If the rights of only a few are disturbed, this constitutes a "private nuisance."

This difference may be critical in an injunctive action. Because public interests may weigh heavier than the interests of a private person, the plaintiff will have a better chance for an injunction if the rights of the public are being disturbed. Public nuisance actions are generally brought by public officials (e.g. district attorneys or the state attorney general). Neighbors generally bring only private nuisance suits.

From 1973 to 1976, five feedlots in the state were sued as odor nuisances. In three of the cases a public nuisance was involved and the feedlots were closed. (Several other operations facing certain prosecution have elected to close voluntarily.) On the other hand, two feedlots sued as private nuisances because of al-

leged decreases in property value of adjoining land successfully defended themselves. One of the feedlots won two such lawsuits, but at a cost of \$30,000 for legal defense.

### Actual and Punitive Damages

Suits for injunctive relief may also have another "count" — actual damages and/or punitive damages. *Actual damages* means that the plaintiff wants to recover his expenses and property losses. The primary legal issue is "Did the polluter cause the damages suffered by the plaintiff?" The fact that a feedlot may have been free of negligence is not considered for liability purposes, because one can cause an "unreasonable interference with enjoyment" without being negligent.

*Punitive damages* are granted because of the defendant's conduct. They may be granted if you "intentionally" injure another person. Legal malice has been defined by the courts as "the doing of a wrongful act intentionally or without just cause or excuse."

For example, if a producer is aware that his waste storage facility does not have capacity to handle the effluent his livestock operation is producing, yet continues to overload it, his conduct could easily be categorized as "doing a wrongful act without just cause or excuse." Then he would be liable for punitive damages. Punitive damages often run into the tens or even hundreds of thousands of dollars. Their basic purpose is to deter similar future conduct by the defendant and others in a similar position.

### Permanent vs. Temporary Nuisance

Another very important factor is whether a feedlot is labeled a temporary or a permanent nuisance. This determination by the court may influence the feedlot's future course of action. A *temporary nuisance* is one which can be corrected. The feedlot could make certain basic changes (e.g. in management) which would result in its being less objectionable to neighbors. A feedlot sued for a temporary nuisance is liable only for damages suffered in the past. However, if the feedlot does not take corrective steps to abate the nuisance, it can be sued again and the plaintiff may collect damages suffered since the previous lawsuit.

A *permanent nuisance* is one which is not economically correctable. Since nothing can be done to relieve the suffering, all damages due the plaintiff, both past and future, are determined by the jury in one lawsuit. Thus, once a feedlot has been termed a permanent nuisance, there may be less incentive to alter the operation to decrease pollution.

The current trend in court decisions is to ask the owner to change the method of operation, if possible. This provides some relief for the plaintiff while letting the defendant continue operation.

## HOW TO AVOID LAWSUITS

Because a suit for an injunction is an equitable action, the court weighs the interest of each party and attempts to reach the fairest possible judgment. While there is no one thing that a feedlot owner can do to be completely safe from nuisance action, the feedlot's legal position can be improved in several ways, particularly if the lawsuit involves damages.

### Zoning

Feedlot operation in an area zoned for agriculture does not give absolute protection against nuisance lawsuits. A feedlot's unreasonable "interference with enjoyment of property" is not affected by zoning. The odor is just as intense with zoning as without it.

However, if the feedlot is located in an area zoned for agricultural use, there is at least evidence that the use of the land is not unreasonable. Also, agricultural zoning keeps the number of people living nearby at a minimum, which is perhaps the greatest benefit from zoning insofar as nuisance lawsuits are concerned. Currently Texas does not have county-wide zoning, so zoning laws seldom come into play here.

### Site Selection

Along with good management, the most important thing a feedlot owner can do to avoid nuisance lawsuits is to select a remote site. Because an injunctive action is tried in a court of "good conscience," the "do unto others as you would have them do unto you" rule is a good one to follow. In other words, be a good neighbor.

Prevailing winds are an important consideration. Probabilities of wind directions (i.e. wind rose diagrams) for major weather stations in Texas are given in several Extension publications listed at the end of this bulletin.

Another important factor is separation distance. Measurable odor intensities are greatly reduced within  $\frac{1}{4}$  mile downwind of a feedlot. A separation distance of at least  $\frac{1}{2}$  mile between a feeding operation and the nearest residence is recommended.

### Priority of Use

"Who was there first" may also be important in some lawsuits. Legally, a feedlot is not protected just because it was there first. The courts have said it is unfair to give the feedlot absolute protection for two reasons. The feedlot may have significantly increased in size after the plaintiff moved in. This size increase may have created the nuisance. Also the plaintiff may not have realized how bad the conditions were when he purchased his property. Either case can be used to show that the plaintiff did not assume the risk of living next to the present nuisance. Proof of assumption of the total risk is needed for absolute protection of the feedlot.

While the law cannot grant absolute protection, the jury may take into account the fact that the feedlot was there first. The jury is not likely to award damages to a plaintiff who has just recently moved into the area affected by the feedlot.

### Balance of Interest Test

The typical nuisance case involves both an injunction and damages. The usual outcome is that damages are granted while the injunction is denied. This gives some protection to existing feedlots. But, with current emphasis on preserving environmental quality, urban areas may not continue to give existing feedlots the major decision-making power for site selection. The "balance of interest test" may be abandoned in favor of more directly satisfying the interests of urban environmental quality.

### Waste Management Facilities

Waste management facilities must be large enough to handle the waste load. If adequate facilities reduce the nuisance level, their installation may be more economical than paying damages imposed by lawsuits.

An important factor in this is proper management of collectible manure. For confinement operations, the feedlot owner should minimize storage of liquid manure, since wet, highly concentrated manure produces odors due to anaerobic bacterial action. In odor sensitive areas, liquid manure should be disposed of by soil injection. Surface spreading should take place far downwind of neighbors. Lagoons for storage and treatment of livestock wastes should be properly sized and intelligently managed. Frequent collection and/or aerobic treatment are also viable options.

For open lot feeding operations, the owner should dewater the runoff retention pond within a very few days after a rainfall. The Texas Water Quality Board stipulation of a 14-day pumpdown period should be taken as a maximum figure for good odor control. As much runoff should be applied as possible without causing salt buildup in the soil or secondary water pollution problems. Annual applications of up to 10 inches on irrigated crops have provided good yields without problems.

Yet another step for open lots is installation of proper runoff settling (debris) basins upstream from the main retention pond. Nebraska research shows that 80 percent of the solids in feedlot runoff can be collected in either a flat baffled channel or a debris basin having  $\frac{1}{10}$  the capacity of the main retention structure. By settling out these solids in an easily drained, readily collectible manner, odors from the main runoff retention structure are reduced. Open feedlots also should have good drainage to prevent anaerobic conditions.

Some other methods of odor control, as listed in Texas Air Control Board operating permits, are pro-

vided in Extension publications MP-1158, "Feedlot Pollution Control Guidelines," and L-1101, "Feedlot Odor."

### Maintenance of Facilities

Maintenance of facilities is also important to prevent or reduce lawsuit damages. Good visual appearance may reduce the chances of being sued, or may improve the feedlot owner's chances in court. Consistent clean-up efforts may convince a jury that there were no intentional, wrongful or unreasonable practices.

### SUMMARY

The Congress, the state legislatures, the U.S. Environmental Protection Agency and state agencies have established a legal framework which has had a profound impact on environmental protection in the last 10 years. But today, the most powerful force in environmental protection is the court. The laws and regulations are interpreted by the courts in individual odor complaint cases, thus bringing about public regulation of odors.

The actual nuisance lawsuit is in most instances a civil lawsuit between two or more individuals or businesses. The suits usually involve nearby neighbors who are requesting the court to award them monetary damages for an injunctive relief from the production

or waste disposal operations of the defendant. To the extent that injunctive relief or monetary damages are granted, the producer is subjected to private regulation of his business. Less formal but equally effective regulation results from actions taken by a producer to avoid such litigation.

From recent private nuisance lawsuits involving livestock feeding operations, it can be concluded that callous disregard for proper waste management can result in expensive punitive damages. On the other hand, injunctions are harsh remedies and are not granted by the courts without substantial cause. Therefore, normal, reasonable operations generally have been allowed to continue.

For additional information, the following Extension publications are available from your county Extension agent.

- L-1198 "Consider Prevailing Winds in Feedlot Site Selection"
- L-1302 "Environmental Protection Requirements for Swine Operations"
- MP-1196 "Environmental Protection Guidelines for Dairies"
- MP-1155 "Feedlot Pollution Control Guidelines"
- Mimeograph "Recent Trends in Odor Nuisance Suits"

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